Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

SAE JOON KIM,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

SAE JOON KIM
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Petitioner Pro Se

May 24, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. 800.890.5001

QUESTIONS PRESENTED

Petitioner, Sae Joon Kim asks that this Court issue a writ of certiorari to make the following determinations:

1. To determine if the Ninth Circuit Court of Appeals abused its appellate jurisdiction when it made its determination on a defense of equitable estoppel where a) such a defense was not provided the opportunity to be fully litigated in the lower courts, and b) where Petitioner was not given the opportunity to present a complete record for this defense, and

2. To resolve the inconsistent treatment of a defense of equitable estoppel by the United States Court of Appeals in cases involving the United States Government.

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CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, *Kim v. Holder*, Docket No 06-72725, is attached to this petition as Appendix A at 1a. The agency opinion issued by the Board of Immigration Appeals, In re Sae Joon Kim a.k.a. Kim Sae J , File No A70-459-936 (BIA May 16, 2006), is attached hereto as Appendix B at 4a The oral decision of the immigration judge is attached as Appendix C at 8a (June 24, 2005).

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered its memorandum denying the timely submitted petition for review on March 17, 2010. *See* Appendix A at 1a.The mandate was subsequently issued by the Ninth Circuit on May 11, 2010, see Appendix D at 12a. The order denying review of the agency appeal is attached hereto as Appendix A at 1a This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U S C. §1254, as the decision below served to deprive Mr. Kim of his due process rights as granted under the Constitution of the United States

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to matters are the Fifth Amendment rights granted to aliens seeking relief from the Courts of the United States, stated in Amendment, in pertinent part, that "No person . shall be deprived of life, liberty, or property, without due process of law." Prior to order for deportation Petitioner was not provided the opportunity to delve into the detailed evidence that

should be part of the record supporting his claim for estoppel. Not been given the opportunity to develop his claim for estoppel violated Petitioner's due process

I. STATEMENT OF THE CASE

Mr Kim, a Korean immigrant, entered the United States on August 7, 1990 His Notice to Appear dated June 20, 2003 charged him with removal pursuant to INA §§237(a)(1)(A) and 212(a)(7)(A)(i)(I). (R 572-573) On June 24, 2005 the Immigration Judge ordered removal of Petitioner. *See* Appendix C at 10a. On June 28, 2005, Petitioner, through his counsel, moved the Board of Immigration Appeals ("BIA") to reconsider the Immigration Judge's decision removing Petitioner The motion to reconsider was made on the grounds that the government should have been estopped from charging respondent with removability pursuant to INA §§237(a)(7)(A)(i)(I) and 237(a)(1)(A) based on government's unclean hands for its involvement in fraud and the lack of Petitioner's opportunity to develop the record and argument supporting estoppel. On May 16, 2006 the BIA issued an order dismissing Petitioner's appeal. *See* Appendix B at 7a.

II. SUMMARY OF ARGUMENT

Mr. Kim hereby asserts that the Immigration Judge, consistent with precedent of the Supreme Court of the United States, determined that the immigration court had no authority to make a determination on a defense of estoppel This determination by the Immigration Judge resulted in a defective record that failed to contain the necessary evidence and facts to support Mr Kim's estoppel defense. This deficient

record failed to provide the Court of Appeals for the Ninth Circuit with the evidence to properly review a defense of estoppel

Mr Kim further asserts that the Court of Appeals for the Ninth Circuit not only based its analysis for estoppel on a deficient record, but also applied an analysis inconsistent with the authority set out by the Supreme Court of the United States. The practical result of this flawed decision will be to eliminate Petitioner's ability to apply a defense of estoppel against the United States Government in an immigration matter

III. ARGUMENT IN SUPPORT OF PETITION

A. Estoppel due to violations of due process.

The court found in the *Matter of Thornburgh*, 869 F 2d 1503, 1512 (D C. Cir 1989) that the government may be estopped from deportation for violations of due process protections of applicants The failure to comply with the due process rights of Appellants for deportation should result in the estoppel of claims of deportation Implications of wrongdoing through violations of due process cannot lead to deportation. The DHS should be estopped from deporting Appellant based on the violations of due process suffered by Petitioner.

The record fails to unveil the details of how the government employee was able to protect himself from criminal prosecution and threats against his life by trading a list of immigrants who had been living law abiding lives in the United States for many years.

Deporting these immigrants without providing them the opportunity to build their estoppel defenses against the actions of this government employee violates the due process rights of Petitioner and each of these affected immigrants.

B. The DHS should be Estopped from removal of Petitioner.

Estoppel is appropriate only where the government committed affirmative misconduct and not merely false processing functions *Santamaria-Ames v INS*, 104 F.3d 1127 (9th Cir. 1996), *Cadwalder v. Andrus*, 45 F 3d 297 (9th Cir. 1995) Petitioner has been entangled within the bribery and fraud convictions of a former INS agent This entanglement only resulted in Petitioner's prosecution by the DHS after the government employee traded names of immigrants in exchange for leniency in crimes he was being prosecuted for. The criminal misconduct committed by the agent of the Government resulted in Petitioner's prosecution for removal Petitioner should be provided the opportunity to present a complete defense of estoppel given the self-serving purposes that embroiled Petitioner into the government employee's wrongdoing Anything short of a full record supporting estoppel violates Petitioner's due process rights

Claims of estoppel against the government apply only when the government's wrongful acts will cause serious injustice and the public's interest will not suffer undue damage by imposition of the liability. *Morgan v Heckler*, 779 F.2d 544 (9th Cir. 1985), *Mukherjee v INS*, 793 F 2d 1006 (9th Cir 1986) Enforcement of deportation of Petitioner will result in serious injustice to Petitioner who has created a

successful life in the United States based on his reliance on the issued immigration status for more than ten years. Similarly, the public's interest is served by allowing Petitioner to remain in the United States and not sever his relationship with this country that will include aspects such as business, education and societal ties. Estoppel is an appropriate remedy in order to prevent severe injustice to Petitioner. *U.S. v Omdahl*, 104 F.3d 1143 (9th Cir. 1997), *Jaa v INS*, 779 F.2d 569 (9th Cir. 1986). Petitioner will suffer a severe injustice if forced to move to South Korea after spending his formative years in the United States, growing up and leading the only life he knows.

No evidence has been presented that shows that Petitioner or his family was aware of the bribery and fraud committed by Sustaire. Estoppel of actions by the Government is appropriate where Petitioner was ignorant of the true criminality committed by the Government and where Petitioner relied upon those actions as true. *S&M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324. Petitioner relied upon the issuance of immigration papers and lived a productive life in the United States at the cost of terminating any meaningful ties with a life in South Korea only after relying on the issuance of immigration papers in the United States. The Government should be estopped from shattering a stable life and forcing Petitioner to leave this country and begin life anew in another country that is now foreign.

CONCLUSION

For the reasons set forth above, Petitioner requests that this Court assume jurisdiction over this case, and find that Petitioner's appeal should be granted and that the decision of the BIA and Immigration Judge and the deportation actions be terminated based on a defense claim of estoppel

Respectfully submitted,

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APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-72725
Agency No. A070-459-936

[Filed March 17, 2010]

SAE JOON KIM, aka Kim Sae J ,	)
	)
Petitioner,	)
	)
v	)
	)
ERIC H. HOLDER JR , Attorney General,	)
	)
Respondent.	)
	)

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir R 36-3

Submitted March 12, 2010**
San Francisco, California

Before WALLACE, GRABER, and McKEOWN, Circuit Judges

Sae Joon Kim, a native and citizen of South Korea, petitions for review of the decision of the Board of Immigration Appeals ("BIA") ordering his removal. Kim is one of several individuals identified by the government as having allegedly received their lawful permanent residence status through the fraudulent scheme of Leland Sustaire, a former Supervisory Adjudications Officer of the Immigration and Naturalization Service.

We deny the petition for review. Kim's challenge to the finding of removability fails because he conceded that he was removable as charged in immigration court. See 8 C.F.R. § 1240.10(c), Young Sun Shin v. Mukasey, 547 F.3d 1019, 1024 (9th Cir. 2008) (holding that where the non-citizen concedes removability, "'the government's burden in this regard is satisfied.'" (quoting Estrada v. INS, 775 F.2d 1018, 1020 (9th Cir. 1985))), cert. denied, 129 S. Ct. 2799 (2009).

We also reject Kim's argument that we should equitably estop his removal in light of Sustaire's criminal wrongdoing. Because "the government is not bound by the *unauthorized* acts of its agents," Kim cannot show "affirmative misconduct going beyond mere negligence" on the part of the government to

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** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

warrant estoppel. Watkins v. U S Army, 875 F 2d 699, 707 (9th Cir 1989) (en banc) (internal quotation marks omitted); cf. Young Sun Shin, 547 F 3d at 1022 (holding that "the government cannot be saddled with the felonious, unauthorized issuance of residency documentation by a thieving employee")

PETITION FOR REVIEW DENIED.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File A70 459 936 - San Francisco

Date: MAY 16, 2006

In re SAE JOON KIM a.k.a Kim Sae J.

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT Alex C. Park, Esquire

ON BEHALF OF DHS: Michael D Steinberg
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U S C § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 212(a)(1) (A)(i)(I), I&N Act [8 U S.C. § 1182(a)(7)(A)(i)(7)] -

Immigrant - no valid immigrant visa or entry document (withdrawn)

Lodged: Sec 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Termination

ORDER

PER CURIAM. The respondent, a native and citizen of Korea, has appealed from the Immigration Judge's decision dated June 24, 2005.

This case stems from the illegal actions of a Department of Homeland Security (DHS) employee, who engaged in a criminal conspiracy to grant lawful status to aliens not otherwise eligible to adjust their status (I.J. at 1-3; Exhs. 3, 5). The respondent in this matter conceded removability for having been inadmissible at the time of entry or adjustment of status under section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(7)(A)(i)(I), because he was not in possession of a valid immigrant visa or entry document (Tr. at 12).

Because the respondent conceded removability, we reject his arguments on appeal that the DHS has not sustained its burden of proof regarding the charge, including the arguments that his Due Process rights were violated by the DHS's failure to link the DHS employee's fraud to the respondent. We also independently find that the Immigration Judge

correctly sustained the charge of removability for lack of possession of valid entry documents based upon clear and convincing evidence. *See* section 240(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(3). The Alien Registration Card (Form I-551) issued to the respondent was not valid because it was issued as part of a conspiracy to grant lawful status to aliens not otherwise eligible to adjust their status. (Exhs. 3, 5).

The respondent also argues that the Immigration Judge erred because there is no link between the respondent and the DHS employee's fraud. We note, however, that the DHS did not charge the respondent with fraud and such a link is not required to establish that the respondent was not in possession of the requisite documents under section 212(a)(7)(A)(i)(I) of the Act, particularly where the respondent has conceded removability.

The respondent's remaining arguments are essentially a request for equitable estoppel against the DHS, in which he contends that, because a DHS employee conferred lawful status upon him, he should be entitled to retain that status. We reject this argument. The United States Circuit Court of Appeals for the Ninth Circuit, under whose jurisdiction this case arises, has agreed with this Board's conclusion that we have no jurisdiction over claims of equitable estoppel. *See Chang v. United States*, 327 F.3d 911, 924 (9th Cir. 2003) (citing *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338-39 (BIA 1991)). Further, the Ninth Circuit has held that "estoppel cannot be invoked against the government because of the unauthorized acts of its agents." *Saulque v. United States*, 663 F.2d 968, 976 (9th Cir. 1981) (internal

citation omitted) Therefore, even were we empowered to adjudicate claims of equitable estoppel, no valid claim would lie here, where the DHS employee committed criminal acts, and thus behaved well beyond his valid authority The respondent has not offered any other appellate argument warranting a reversal of the Immigration Judge's order of removal

Accordingly, the appeal is dismissed

/s/ _____
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
San Francisco, California

File A 70 459 936

[Filed June 24, 2005]

In the Matter of	)
	)
SAB JOON KIM,	)
	)
Respondent	)
	)

IN REMOVAL PROCEEDINGS

CHARGE INA Section 212(a)(7)(A)(i)(I), immigrant not in possession of valid documents

APPLICATIONS: None.

ON BEHALF OF RESPONDENT:

Alex Park, Esquire

ON BEHALF OF DHS

James Knapp, Esquire

Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in this case is a native and citizen of the Republic of Korea This is a case in which the respondent was issued a green card as a result of the fraudulent and criminal activities of a former INS employee named Leland Dwayne Sestaire The respondent concedes as charged in the Notice to Appear that he is not a citizen of the United States and that when he entered the United States, he was in possession of and entered on the basis of a lawful permanent resident card or Form I-551 that was created without legal or factual basis by an Immigration and Naturalization Service officer The respondent concedes that when he entered the United States, he did not possess valid immigration documents, and concedes the charge of removability against him

As noted above, this is one of the so-called Sestaire cases The parties submitted the case on the documentary evidence in the record. That evidence, including the testimony of Mr Sestaire, and the record of criminal convictions entered in the cases of Mr Sestaire and his co-conspirators, shows beyond any doubt, as noted above the parties do not dispute, that between the late 1980's and mid 1990's, Mr Sestaire, along with other individuals who were Korean American engaged in a conspiracy according to which Mr Sestaire's co-conspirators encouraged individuals such as the respondent to apply for green cards and the co-conspirators took money from persons such as the respondent representing these monies to be processing fees and legal fees, but they were in reality

bribes that were shared between Mr. Sestaire and the co-conspirators. As a result of these monetary bribes, Mr Sestaire, who was authorized to direct an INS Service Center to issue I-551's, did in fact cause the issuance of the fraudulent documents, which on their face appeared to be genuine Mr. Sestaire kept a list of individuals whose Form I-551's were issued as a result of his fraudulent scheme, and the respondent's green card number does appear on that list. Mr Sestaire was ultimately convicted for his role in this fraudulent scheme as were his co-conspirators.

In light of the fact that the respondents acknowledge that his green card was not validly issued, was issued as part of Mr Sestaire's fraudulent scheme, the respondent really has no option, but to concede that he is in fact removable because he is not in possession of valid immigration documents The respondent has preserved however, the issue that he raised with this Court, namely that the Government should be estopped from removing him, because the Government has unclean hands in light of the fact that Sestaire was a Government employee. This Court, however, has no jurisdiction to estop DHS from going forward with removal proceedings. Estoppel is an equitable remedy. This Court is a creature of statute and regulation, and neither statute or regulation give this Court the authority to estop the Government at least in a circumstance such as this. The issue however, has been preserved for appeal

The respondent has no applications pending, and accordingly the order will be that the respondent is ordered to be removed to South Korea. Appeal will be reserved for the respondent

/s/Anthony S Murry
ANTHONY S MURRY
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before ANTHONY S MURRY in the matter of:

SAE JOON KIM

A 70 459 936

San Francisco, CA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/Gertrina T Avent
Gertrina T. Avent (Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

December 13, 2005
(Completion Date)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-72725
Agency No. A070-459-936
Board of Immigration Appeals

[Filed May 11, 2010]

SAE JOON KIM, aka Kim Sae J ,	)
	)
Petitioner,	)
	)
v.	)
	)
ERIC H. HOLDER JR , Attorney General,	)
	)
Respondent.	)
	)

MANDATE

The judgment of this Court, entered March 17, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT·

Molly C. Dwyer
Clerk of Court

Synitha Walker
Deputy Clerk